

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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PANLIANT FINANCIAL  
CORPORATION, et al.,

Plaintiffs,

v.

ISEE3D, Inc., et al.,

Defendants.

2:12-CV-01376-PMP-CWH

ORDER

Presently before the Court is Plaintiffs Panliant Financial Corporation, Alan G. Smith, and A.G. Solutions Limited's Response to Order to Show Cause Why ISEE3D, Inc. Should Not Be Dismissed in Response to Court's Order Dated 12/29/14 and Motion to Extend Time to Serve Pursuant to Federal Rule of Civil Procedure 4(m) Nunc Pro Tunc (Doc. #89) ("Response to Order to Show Cause"), filed January 8, 2015.

Plaintiffs previously moved for default judgment against Defendant ISEE3D, Inc. ("ISEE3D") in the amount of \$11,864,246.66. (Appl. for Default J. Against Defs. ISEE3D, Inc. & Ilya Sorokin (Doc. #71).) Given that Plaintiffs did not serve ISEE3D until 185 days after the August 5, 2013, court-ordered deadline, and did not move to extend the deadline, the Court denied Plaintiffs' Application for Default Judgment. (Order (Doc. #87) at 7-10.) The Court further ordered Plaintiffs to show cause why this action should not be dismissed as to ISEE3D pursuant to Federal Rule of Civil Procedure 4(m). (*Id.* at 9.) In its Order, the Court advised Plaintiffs that their "failure to comply with the court-ordered deadline, combined with a failure to request an extension of that deadline, weighs strongly against a

1 finding of good cause” as to why service was not made by the court-ordered deadline. (Id.)

2         Plaintiffs respond that there is good cause why service was not completed by the  
3 court-ordered deadline. Specifically, Plaintiffs argue they exercised diligence in serving  
4 ISEE3D. Plaintiffs submit affidavits by Plaintiff Alan Smith and Plaintiffs’ counsel,  
5 Allyson R. Noto, which describe in detail the efforts Plaintiffs made to serve ISEE3D.  
6 (Response to Order to Show Cause, Ex. 1 [“Noto Aff.”], Ex. 2 [“Smith Aff.”].) Based on  
7 the affidavits, it appears that the delay in serving ISEE3D partly was occasioned by the fact  
8 that Plaintiffs’ former counsel, who had initiated service on ISEE3D, withdrew from the  
9 case on July 2, 2013, approximately one month before the court-ordered service deadline.  
10 (Smith Aff. at 2; Order (Doc. #21).) For instance, the affidavits describe the difficulties  
11 Plaintiffs and Plaintiffs’ current counsel encountered in attempting to communicate with  
12 former counsel regarding the status of service, as well as the difficulties current counsel  
13 encountered in confirming the status of service with Judicial Process & Support, the  
14 company that former counsel hired to serve ISEE3D. (Noto Aff. at 2-3; Smith Aff. at 2.)  
15 An additional complicating factor was that Plaintiffs’ current counsel did not receive  
16 Plaintiffs’ signed retainer agreement and begin reviewing Plaintiffs’ file until August 27,  
17 2013, which was after the court-ordered deadline already had passed. (Noto Aff. at 2.)

18         According to Plaintiffs’ current counsel, “[g]ood cause exists that service was not  
19 accomplished by August 5, 2013 as I had no information available prior to the expiration of  
20 the deadline to suggest that Plaintiffs former counsel had not properly initiated service.”  
21 (Noto Aff. at 4.) Plaintiffs’ counsel further states “[t]hat upon being retained and it [was]  
22 conclusively established that Plaintiffs’ former counsel had initiated service of process via  
23 Judicial Process, I and the Plaintiffs took additional steps to serve via Federal Express in  
24 conjunction with what service the undersigned believed was being effectuated by Judicial  
25 Process.” (Id.) (emphasis omitted). Given that ISEE3D’s former counsel refused to accept  
26 service of process at ISEE3D’s last known address, Plaintiffs investigated additional

1 addresses where they could serve ISEE3D. (Noto Aff. at 4-5; Smith Aff. at 3.) Ultimately,  
 2 Plaintiffs hired a process server who served the Summons and Amended Complaint on  
 3 February 6, 2014, “by mail slotting them at the Registered Office address listed on the  
 4 Corporate Profile with Corporations Canada.” (Resp. to Order to Show Cause, Ex. 8 at 1.)

5 Plaintiffs further respond that ISEE3D received actual notice of the lawsuit  
 6 through the process server’s delivery of the Summons and Amended Complaint to the  
 7 Registered Office. Plaintiffs contend ISEE3D has not been prejudiced by the delay in  
 8 service because it has had ample time to participate in the lawsuit, but has failed to do so.  
 9 On the other hand, Plaintiffs argue they will suffer severe prejudice if the case is dismissed  
 10 as to ISEE3D because the applicable statutes of limitation likely will have run on Plaintiffs’  
 11 claims. In sum, Plaintiffs request that the Court “find that there was good cause that service  
 12 was not effectuated by the deadline, extend time for service of ISEE3D nunc pro tunc and  
 13 enter default judgment against ISEE3D.” (Resp. to Order to Show Cause at 16.)

14 Federal Rule of Civil Procedure 4(m) establishes the time for service on domestic  
 15 defendants:

16 If a defendant is not served within 120 days after the complaint is filed, the  
 17 court-on motion or on its own after notice to the plaintiff-must dismiss the  
 18 action without prejudice against that defendant or order that service be made  
 19 within a specified time. But if the plaintiff shows good cause for the failure,  
 the court must extend the time for service for an appropriate period. This  
 subdivision (m) does not apply to service in a foreign country under Rule 4(f)  
 or 4(j)(1).

20 The Court must extend the 120-day time limit of Rule 4(m) if the serving party shows good  
 21 cause for failure to serve within 120 days. Lemoge v. United States, 587 F.3d 1188, 1198  
 22 (9th Cir. 2009). If the serving party does not show good cause, the Court has discretion to  
 23 extend time for service, or to dismiss the complaint without prejudice. In re Sheehan, 253  
 24 F.3d 507, 513 (9th Cir. 2001). The Court’s discretion to extend time for service, or to  
 25 dismiss without prejudice for failure to timely serve, is broad. Id. The Court may extend  
 26 time for service even after the 120-day period expires. Efaw v. Williams, 473 F.3d 1038,

1 1041 (9th Cir. 2007).

2 When a defendant is not timely served, the serving party bears the burden of  
3 demonstrating good cause for the delay. Fed. R. Civ. P. 4(m); see also Boudette v.  
4 Barnette, 923 F.2d 754, 755-56 (9th Cir. 1991). Courts must determine on a case-by-case  
5 basis whether the serving party has shown good cause. In re Sheehan, 253 F.3d at 512.  
6 Generally, good cause is equated with diligence. Townsel v. Contra Costa Cnty., Cal., 820  
7 F.2d 319, 320 (9th Cir. 1987). A showing of good cause requires more than inadvertence or  
8 mistake of counsel. Id. “[A]t a minimum, good cause means excusable neglect.” In re  
9 Sheehan, 253 F.3d at 512 (quotation omitted). Additionally, a serving party may need to  
10 show that the party to be served received actual notice of the lawsuit, the party to be served  
11 would suffer no prejudice, and the serving party would be severely prejudiced if the  
12 complaint is dismissed. Id. The Court also may consider whether the serving party  
13 eventually accomplished service. Efaw, 473 F.3d at 1041.

14 Here, Plaintiffs twice moved the Court for an extension of time to serve all  
15 Defendants. (Order (Doc. #87) at 2.) The Court granted both motions, and set August 5,  
16 2013, as the deadline to accomplish service on all Defendants. (Id.) Plaintiffs  
17 accomplished service on ISEE3D on February 6, 2014, which was 185 days after the  
18 court-ordered deadline. (Id.; Resp. to Order to Show Cause, Ex. 8 at 1.) Plaintiffs therefore  
19 failed to timely serve ISEE3D.

20 Plaintiffs have not demonstrated good cause to extend time to serve ISEE3D.  
21 Plaintiffs have shown that ISEE3D eventually was served with the Summons and Amended  
22 Complaint via delivery in the mail slot at the Registered Office. Although Defendants  
23 Dwight Romanica and Ilya Sorokin, whom Plaintiffs allege are former officers and board  
24 members, respectively, of ISEE3D, are participating in the lawsuit, it is unclear whether  
25 ISEE3D has actual knowledge of the lawsuit, so the Court cannot evaluate whether ISEE3D  
26 would be prejudiced if time were extended. Plaintiffs have shown they would be severely

1 prejudiced by a dismissal for failure to timely serve ISEE3D because the applicable statutes  
2 of limitations likely would preclude them from refileing their lawsuit and timely serving  
3 ISEE3D.

4           However, Plaintiffs have failed to demonstrate they were diligent in serving  
5 ISEE3D. According to Plaintiffs, “it is unknown why Plaintiffs’ former counsel did not  
6 ultimately provide the required documentation to Judicial Process until shortly before the  
7 deadline to serve . . . .” (Resp. to Order to Show Cause at 10.) Although the Mr. Smith’s  
8 affidavit describes in detail the efforts Plaintiffs took related to service on ISEE3D both  
9 before and after the court-ordered deadline, Plaintiffs offer no evidence or explanation as to  
10 why they did not move to extend the service deadline when they were unable to confirm  
11 whether service would be accomplished by the court-ordered deadline. Although Plaintiffs’  
12 current counsel did not begin working on this case until after the service deadline had  
13 passed, her affidavit indicates that former counsel was uncommunicative and that she was  
14 unable to confirm the status of service with Judicial Process & Support. Regardless,  
15 Plaintiffs do not offer evidence or explanation as to why they did not move to extend the  
16 service deadline after they retained new counsel. Plaintiffs demonstrated a similar lack of  
17 diligence in serving Defendant Bay Management Ltd., which previously was dismissed  
18 from this case because it was served 53 days after the court-ordered deadline. (Order (Doc.  
19 #70).)

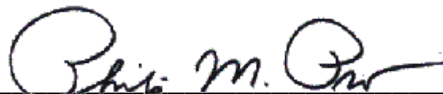
20           Under Rule 4, the Court has discretion, even without good cause, to extend the  
21 time for service, but the Court declines to do so under the circumstances of this case.  
22 Plaintiffs previously were afforded two extensions of time to serve all Defendants.  
23 Nevertheless, Plaintiffs served ISEE3D 185 days after the court-ordered deadline, and  
24 failed to move to extend the court-ordered deadline. Plaintiffs also failed to meet the  
25 court-ordered service deadline with respect to Defendant Bay Management. Under these  
26 circumstances, the Court declines to extend time to serve ISEE3D for a third time. The

1 Court therefore will deny Plaintiffs' Motion to Extend Time to Serve and will dismiss this  
2 case as to ISEE3D. To the extent Plaintiffs' Motion also seeks reconsideration of the  
3 Court's Order (Doc. #87) denying Plaintiffs' Motion for Default Judgment as to ISEE3D,  
4 any such motion also is denied.

5 IT IS THEREFORE ORDERED that Plaintiffs Panliant Financial Corporation,  
6 Alan G. Smith, and A.G. Solutions Limited's Response to Order to Show Cause Why  
7 ISEE3D, Inc. Should Not Be Dismissed in Response to Court's Order Dated 12/29/14 and  
8 Motion to Extend Time to Serve Pursuant to Federal Rule of Civil Procedure 4(m) Nunc  
9 Pro Tunc (Doc. #89) is DENIED.

10 IT IS FURTHER ORDERED that this action is DISMISSED as to Defendant  
11 ISEE3D, Inc.

12  
13 DATED: January 15, 2015

14   
15 PHILIP M. PRO  
16 United States District Judge  
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